IP 05-0043-CR 1 H/F US v Bermudez
Magistrate Kennard P. Foster Signed on 7/15/05

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

USA,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	
BERMUDEZ, JUAN CARLOS,	)	CAUSE NO. IP05-0043-CR-01-?/?
	)	
Defendant.	)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	CAUSE NO. IP 05-43-CR-01-H/F
JUAN CARLOS BERMUDEZ,	)	
	)	
	)	
Defendant.	)	

ENTRY AND ORDER OF DETENTION PENDING TRIAL

SUMMARY

The defendant is charged in a superseding indictment returned on July 12, 2005 charging him in count one with conspiracy to possess with intent to distribute and to distribute 5 kilograms or more of a mixture or substance containing a detectable amount of cocaine, a Schedule II Narcotic Controlled Substance, in violation of 21 U.S.C. §§ 841(a)(1) and 846, and in count two of the superseding indictment with conspiracy to import into the customs territory of the United States of America from the Republic of Mexico 5 kilograms or more of a mixture or substance containing a detectable amount of cocaine, a Schedule II Narcotic Controlled Substance, in violation of 21 U.S.C. §§ 952 and 963. The government moved for detention pursuant to 18 U.S.C. §§ 3142(e), (f)(1)(B), (f)(1)(C), and (f)(2)(A) on the grounds that the defendant is charged with a drug trafficking offense with the maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act, and the defendant is a serious risk of flight, if released. The initial appearance on the superseding indictment and the detention

hearing were held on July 13, 2005. The United States appeared by John E. Dowd, Assistant United States Attorney. Mr. Juan Carlos Bermudez appeared in person and by his retained counsel, Mark Inman.

At the detention hearing, the Government rested on the presumption established by the superseding indictment, and testimony from United States Drug Enforcement Administration Special Agent Michael Cline. The Court found that the superseding indictment constituted probable cause to believe that the defendant committed the crimes charged. The charges in the superseding indictment give rise to the presumptions that there is no condition or combination of conditions of release which will reasonably assure the safety of the community or that the defendant will not be a serious risk to flee if released.

The proffer of evidence presented at the detention hearing by the defendant's counsel did not rebut the presumptions that the defendant is serious risk of flight, or rebut the presumption found in 18 U.S.C. § 3142(e) that the defendant is a danger to the community. Furthermore, the totality of the evidence presented demonstrates clearly and convincingly that there is no condition or a combination of conditions of release which will reasonably assure the safety of the community, and that clearly and convincingly the evidence demonstrates that the defendant will be a serious risk of flight if released. Consequently, the defendant was ordered detained.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The defendant is charged in a superseding indictment returned on July 12, 2005 with one count of conspiracy to distribute and to possess with intent to distribute 5 kilograms or more of cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 846, and one count of conspiracy to import into the customs territory of the United States of America from the Republic of Mexico 5

kilograms or more of a mixture or substance containing a detectable amount of cocaine, a Schedule II Narcotic Controlled Substance, in violation of 21 U.S.C. §§ 952 and 963.

2. Based on the amount of cocaine alleged in the indictment, the penalty for the conspiracy to possession with the intent to distribute and to distribute 5 kilograms or more of cocaine in violation of 21 U.S.C. §§ 841(a)(1), 841(b) and 846, and the conspiracy to import into the customs territory of the United States of America from the Republic of Mexico 5 kilograms or more of a mixture or substance containing a detectable amount of cocaine, a Schedule II Narcotic Controlled Substance, in violation of 21 U.S.C. §§ 952 and 963 are mandatory minimum sentences of 10 years and a maximums of life imprisonment for the two counts in the superseding indictment in which Mr. Juan Carlos Bermudez is charged.

3. The Court takes judicial notice of the superseding indictment in this cause. The Court further incorporates the evidence admitted during the detention hearing, as if set forth here.

4. The government submitted the matter on the superseding indictment and the testimony of DEA S/A Michael Cline. Counsel for the defendant examined S/A Cline on all issues before the court. S/A Cline testified that the defendant was arrested in Chicago on June 14, 2005 by agents from ICE (Immigration and Customs Enforcement) at Midway Airport while he was boarding an airplane destined for California with an ultimate destination of Mexico. S/A Cline further testified that during the investigation he determined that Juan Carlos Bermudez frequently traveled to Mexico and was the primary source of supply for the cocaine distributed during the course of the charged conspiracy and had extensive contacts in Mexico.

The Court admitted the PS3s for Mr. Bermudez. Mr. Bermudez has a rather murky employment history as well as a questionable residential location. Mr. Bermudez also tested positive for the presence of cocaine in his system at the time of his arrest.

5. The Court finds that the superseding indictment established probable cause for the offenses charged, and the rebuttable presumptions arise that the defendant is a serious risk of flight and a danger to the community or any other person. 18 U.S.C. § 3142(e).

6. In the first instance, the evidence at the detention hearing does not rebut the presumptions found in 18 U.S.C. § 3142(e) that the defendant is a serious risk of flight and a danger to the community or any other person. Furthermore, the totality of the evidence presented demonstrates clearly and convincingly that there is no condition or a combination of conditions of release which will reasonably assure the safety of the community, and clearly and convincingly that the defendant will be a serious risk of flight if released. Therefore, Juan Carlos Bermudez is ORDERED DETAINED.

7. When a motion for pretrial detention is made, the Court engages a two-step analysis: first, the judicial officer determines whether one of six conditions exists for considering a defendant for pretrial detention; second, after a hearing, the Court determines whether the standard for pretrial detention is met. *United States v. Friedman*, 837 F.2d 48, 49 (2nd Cir. 1988).

A defendant may be considered for pretrial detention in only six circumstances: when a case involves one of either four types of offenses or two types of risks. A defendant is eligible for detention upon motion by the United States in cases involving (1) a crime of violence, (2) an offense with a maximum punishment of life imprisonment or death, (3) specified drug offenses carrying a maximum term of imprisonment of ten years or more, or (4) any felony where the defendant has two or more federal convictions for the above offenses or state convictions for identical offenses, 18 U.S.C. § 3142(f)(1), or, upon motion by the United States or the Court *sua sponte*, in cases involving (5) a serious risk that the person will flee, or (6) a serious risk that the

defendant will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, a prospective witness or juror. *Id.*, § 3142(f)(2); *United States v. Sloan*, 820 F.Supp. 1133, 1135-36 (S.D. Ind. 1993). The existence of any of these six conditions triggers the detention hearing which is a prerequisite for an order of pretrial detention. 18 U.S.C. § 3142(e). The judicial officer determines the existence of these conditions by a preponderance of the evidence. *Friedman*, 837 F.2d at 49. *See United States v. DeBeir*, 16 F.Supp.2d 592, 595 (D. Md. 1998) (serious risk of flight); *United States v. Carter*, 996 F.Supp. 260, 265 (W.D. N.Y. 1998) (same). In this case, the United States moves for detention pursuant to § 3142(f)(1)(B) (C), and (f)(2)(A) and the Court has found these bases exist.

Once it is determined that a defendant qualifies under any of the six conditions of § 3142(f), the court may order a defendant detained before trial if the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community. 18 U.S.C. § 3142(e). Detention may be based on a showing of either dangerousness or risk of flight; proof of both is not required. *United States v. Fortna*, 769 F.2d 243, 249 (5th Cir. 1985). With respect to reasonably assuring the appearance of the defendant, the United States bears the burden of proof by a preponderance of the evidence. *United States v. Portes*, 786 F.2d 758, 765 (7th Cir. 1985); *United States v. Himler*, 797 F.2d 156, 161 (3rd Cir. 1986); *United States v. Vortis*, 785 F.2d 327, 328-29 (D.C. Cir.), *cert. denied*, 479 U.S. 841, 107 S.Ct. 148, 93 L.Ed.2d 89 (1986); *Fortna*, 769 F.2d at 250; *United States v. Chimurenga*, 760 F.2d 400, 405-06 (2nd Cir. 1985); *United States v. Orta*, 760 F.2d 887, 891 & n. 20 (8th Cir. 1985); *United States v. Leibowitz*, 652 F.Supp. 591, 596 (N.D. Ind. 1987). With respect to reasonably assuring the safety of any other person and the community, the United States bears the burden of proving its allegations by clear

and convincing evidence. 18 U.S.C. § 3142(f); *United States v. Salerno*, 481 U.S. 739, 742, 107 S.Ct. 2095, 2099, 95 L.Ed.2d 697 (1987); *Portes*, 786 F.2d at 764; *Orta*, 760 F.2d at 891 & n. 18; *Leibowitz*, 652 F.Supp. at 596; *United States v. Knight*, 636 F.Supp. 1462, 1465 (S.D. Fla. 1986). Clear and convincing evidence is something more than a preponderance of the evidence but less than proof beyond a reasonable doubt. *Addington v. Texas*, 441 U.S. 418, 431-33, 99 S.Ct. 1804, 1812-13, 60 L.Ed.2d 323 (1979). The standard for pretrial detention is "reasonable assurance"; a court may not order pretrial detention because there is no condition or combination of conditions which would *guarantee* the defendant's appearance or the safety of the community. *Portes*, 786 F.2d at 764 n. 7; *Fortna*, 769 F.2d at 250; *Orta*, 760 F.2d at 891-92.

8. A rebuttable presumption that no condition or combination of conditions will reasonably assure the defendant's appearance or the safety of any other person and the community arises when the judicial officer finds that there is probable cause to believe that the defendant committed an offense under (1) the Controlled Substances Act, 21 U.S.C. § 801 *et seq.*; the Controlled Substances Import and Export Act, 21 U.S.C. § 951 *et seq.*, or the Maritime Drug Law Enforcement Act, 46 U.S.C. App. § 1901 *et seq.*, for which a maximum term of imprisonment of ten years is prescribed; (2) 18 U.S.C. § 924(c); (3) 18 U.S.C. § 956(a); or (4) 18 U.S.C. § 2332b. 18 U.S.C. § 3142(e).

This presumption creates a burden of production upon a defendant, not a burden of persuasion: the defendant must produce a basis for believing that he will appear as required and will not pose a danger to the community. Although most rebuttable presumptions disappear when any evidence is presented in opposition, a § 3142(e) presumption is not such a "bursting bubble". *Portes*, 786 F.2d at 765; *United States v. Jessup*, 757 F.2d 378, 383 (1st Cir. 1985). Therefore, when a defendant has rebutted a presumption by producing some evidence contrary to

it, a judge should still give weight to Congress' finding and direction that repeat offenders involved in crimes of violence or drug trafficking, as a general rule, pose special risks of flight and dangers to the community. *United States v. Dominguez*, 783 F.2d 702, 707 (7th Cir. 1986) (presumption of dangerousness); *United States v. Diaz*, 777 F.2d 1236, 1238 (7th Cir. 1985); *Jessup*, 757 F.2d at 383.

The Court has found the presumptions arise in this case. The evidence presented at the detention hearing did not rebut the presumptions that the defendant is a serious risk of flight and a danger to the community.

10. Assuming *arguendo* the defendant had rebutted both of the presumptions, he would still be detained. The Court considers the evidence presented on the issue of release or detention weighed in accordance with the factors set forth in 18 U.S.C. § 3142(g) and the legal standards set forth above. Among the factors considered both on the issue of flight and dangerousness to the community are the defendant's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearances at court proceedings. 18 U.S.C. § 3142(g)(3)(A). The presence of community ties and related ties have been found to have no correlation with the issue of safety of the community. *United States v. Delker*, 757 F.2d 1390, 1396 (3rd Cir. 1985); S.Rep. No. 98-225, 98th Cong., 1st Sess. at 24, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3207-08.

11. In this regard, the Court finds and concludes that the evidence in this case demonstrates the following:

a. This case charges the defendant based on an incipient conspiracy involving cocaine and crack cocaine, narcotic drugs. As well as cocaine, firearms were recovered.

The presence of firearms along with this quantity of a narcotic drug increases the danger to the community.

b. The evidence admitted during the detention hearing demonstrates a strong probability of conviction.

c. The possible mandatory minimum sentence of ten years and maximum of life for the drug charge for Mr. Bermudez and when coupled with the fact that Mr. Bermudez has a history of frequent travel to the country of Mexico, and the further fact that the country of Mexico does not follow its treaty obligations with the United States in certain instances involving the extradition of fugitives substantially increases the seriousness of his risk of flight.

d. The defendant's involvement with this huge quantity of cocaine, millions of dollars of drug proceeds and his position of being at the pinnacle of the charged conspiracy reflects that he is a danger to the community. The breadth of his contacts in Mexico, Chicago, and California and his position as the primary leader and manager of this international cocaine conspiracy demonstrate that he is persistent danger to the community.

e. The Court having weighed the evidence regarding the factors found in 18 U.S.C. § 3142(g), and based upon the totality of evidence set forth above, concludes that the defendant has not rebutted the presumptions in favor of detention, and should be detained. Furthermore, he is, by clear and convincing evidence, a serious risks of flight and clearly and convincingly a danger to the community.

WHEREFORE, Juan Carlos Bermudez is hereby committed to the custody of the Attorney General or his designated representative for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in

custody pending appeal. They shall be afforded a reasonable opportunity for private consultation with defense counsel. Upon order of this Court or on request of an attorney for the government, the person in charge of the corrections facility shall deliver the defendant to the United States Marshal for the purpose of an appearance in connection with the Court proceeding.

Dated this _____ day of July, 2005.

Kennard P. Foster, Magistrate Judge
United States District Court

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